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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY BOLTON,

Defendant and Appellant.

D074594

(Super. Ct. No. SCD275924)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed.

Sheila O'Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Seth M. Friedman and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Timothy Bolton guilty of robbery (Pen. Code,¹ § 211) and three counts of using the identifying information of another (§ 530.5, subd. (a)). The trial court found true that defendant had two probation denial priors (§ 1203, subd. (e)(4)); a prison prior (§§ 667.5 & 668); a serious felony prior (§ 667, subd. (a)(1)); and a strike prior (§§ 667, subds. (b)-(i) & 1192.7, subd. (c)).

At defendant's sentencing, the court without objection imposed a \$750² restitution fine (§1202.4, subd. (b)(1)) and a matching parole revocation restitution fine (§ 1202.45); a \$160 court operations assessment (§ 1465.8, subd. (a)(1)); a \$154 criminal justice administration fee (Gov. Code, § 29550); and a \$120 criminal conviction assessment (Gov. Code, § 70373). The court also ordered defendant to pay victim restitution of \$1,048. (§ 1202.4, subd. (f).) After exercising its discretion and striking the one-year prison prior, the court sentenced defendant to an aggregate term of 15 years, comprised of 10 years for the robbery (the upper term of five years, doubled for the strike prior), plus five years for the serious felony prior.³

¹ All further statutory references are to the Penal Code.

² The court initially imposed the maximum \$10,000 restitution fine, as recommended by probation, but reduced it to \$750 at a subsequent hearing.

³ The court originally imposed 16-month sentences on each conviction of using the identifying information of another, concluding such sentences would run concurrent and not consecutive to the sentence on the robbery conviction. At a resentencing hearing, however, the court over the People's objection reduced the three counts of using the identifying information of another to misdemeanors pursuant to Proposition 47, the "Safe Neighborhoods and Schools Act."

Defendant contends the court erred in imposing the \$750 restitution fine and the other fees and assessments without first considering his ability to pay, relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). He thus seeks remand of the matter for such a determination, and to allow the court to exercise its discretion under Senate Bill No. 1393 (2017–2018 Reg. Sess.), which amended sections 667, subdivision (a) and 1385, subdivision (b), effective January 1, 2019, to give a court discretion for sentencing purposes to dismiss or strike a prior serious felony conviction.

As we explain, we conclude that defendant waived his statutory right to object to the restitution fine pursuant to section 1202.4, subdivisions (c) and (d); that he also waived his right to object to the remaining fees and assessments; and that his circumstances are, in any event, nothing like those in *Dueñas* and thus, we can infer an ability to pay \$1,184 (\$750 + \$160 + \$154 + \$120) from wages defendant will earn in prison.

Moreover, we also conclude that remand under newly amended sections 667, subdivision (a)(1) and 1385, subdivision (b) is unnecessary and would be an "idle act" because the court during defendant's sentencing twice unambiguously stated that, *if* it had discretion to strike the serious felony prior imposed pursuant to section 667, subdivision (a)(1), it would not do so because defendant's prior involved the theft of a gun during a burglary, was recent, and defendant was armed at the time of his arrest for that offense. Affirmed.

OVERVIEW⁴

On February 22, 2018, at about 10:30 p.m., victim Jennifer B. was walking east on the 3800 block of Market Street in San Diego toward home. As she walked, she noticed a car heading west on Market Street slow down and then start "creeping slowly towards [her]." Because it was dark outside and she was "blinded by the headlights," Jennifer could not identify the make or color of the car.

Just as the car was about to pass, Jennifer saw a man exit the car from the passenger side door. The man was holding a gun, which he pointed toward the ground. The gunman approached her and, when he was about three feet away, demanded she turn over her purse and cell phone. As the gunman turned to get back in the car with her belongings, Jennifer rhetorically asked what was "wrong with them." The gunman in response "raised the gun to [her] head." "Terrified," Jennifer put her hands in the air and started to walk away.

Jennifer described the gunman as dark skinned, who wore a black or dark hoodie and who had a red bandana covering his face except for his eyes, which were also dark. Jennifer could not describe the driver of the car. Inside her purse was a wallet, containing cash, multiple blue bank cards, pepper spray, and makeup, among other items.

Once home, Jennifer went to a neighbor's house and called police. A recording of the 911 call made by Jennifer was played for the jury. A transcript of the call was included in the record. The transcript shows Jennifer was crying as she reported the

⁴ We summarize the evidence in the light most favorable to the prosecution. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.)

incident to dispatch. Later that evening, Jennifer used her computer to log into her bank accounts and found that at least two of her stolen bank cards already had been used, twice at a Jack in the Box, store number 3047, at about 10:41 p.m., and once at Tacos El Paisa restaurant about an hour later.

In early March 2018, an officer from the San Diego Police Department contacted Jennifer after finding what he believed was her cell phone. Jennifer provided the officer her password, which allowed the officer to unlock and access the contents of the phone. Jennifer also identified for the officer a photograph that she kept in the back of her clear phone case, as well as the case itself, and a screenshot from her phone.

The manager of the Jack in the Box, store 3047, testified the restaurant was located on 43rd Street in San Diego and had video surveillance equipment that was operating on the night of the robbery. The surveillance equipment included a camera that recorded a car's license plate as it was being driven through the drive-thru window. The manager was shown a series of exhibits from February 22, 2018, at "22:40" or 10:40 p.m., just minutes after the robbery. A screenshot from the drive-thru video identified defendant as the car's driver. The asset protection manager for Jack in the Box confirmed Jennifer's bank cards were used for two transactions on February 22 at 10:41:57 p.m., one for \$8.19, and another for \$23.85.

Similar to Jack in the Box, Tacos El Paisa also had an operating video surveillance system on the night of the robbery, including at the drive-thru window where food was paid for and delivered by a restaurant employee. It showed a car pulling up to the restaurant at 11:27 p.m. and its occupants attempting to purchase food with a bank card.

Because the cost of the food exceeded \$30, the Tacos El Paisa employee asked for picture identification. The occupants then drove off without the food, only to return about two minutes later.

When they returned, this time they gave the employee a bank card along with picture identification, with one of them claiming the identification belonged to his girlfriend. The employee then processed the card. Because the employee described the area near the restaurant as "dangerous," she typically did not look inside cars including at their occupants. At 11:48 p.m., the video showed the car driving off after the employee delivered their food.

A detective from the San Diego Police Department reviewed the surveillance video from both Jack and the Box and Tacos El Paisa, where Jennifer's bank cards had been used shortly after the robbery. Regarding the video from the Jack in the Box drive-thru, it showed defendant sitting in the car's driver's seat using a bank card to buy food at about 10:40 p.m. The video also showed the car's passenger passing bank cards to defendant, and defendant passing one of Jennifer's "bright blue colored card[s]" to the cashier for payment.

Once this transaction was completed, the video showed a second transaction in which defendant used another of Jennifer's bank cards to buy more food. The video also showed both defendant and his passenger were wearing dark hoodie sweaters. Also visible in the video was a red bandana located near the car's center console.

The detective took a still shot from the surveillance video capturing the license plate number of the car being driven by defendant. The detective ran the plate number

and found the registered owners of the car were defendant and another individual. Based on that information, the detective obtained a photograph of defendant from the Department of Motor Vehicles.

The detective followed a similar procedure with respect to the Tacos El Paisa surveillance video and found the car caught on video from that restaurant had the same plate number, and looked the same, as the car that had come through the drive-thru window at Jack in the Box about an hour earlier. The detective also was able to get a copy of the receipt signed by the car's driver, which showed the payment of \$36.84 made on one of Jennifer's stolen bank cards.

On March 2, 2018, at about 9:40 p.m., a police officer working with the crime suppression team located and stopped defendant in his car. A lawful search of the car uncovered a replica firearm (missing the orange tip) on the driver's-side floorboard, and a red "handkerchief or bandana" wrapped around the car's "gear shift."

Also located in the car inside a backpack was a cell phone, which matched the description of the phone stolen from Jennifer during the February 22 robbery. As noted, police contacted Jennifer, who provided her password allowing them to unlock or "open" the phone, confirming it belonged to her. Police also found in the car's "coin pocket" the photograph Jennifer kept in the back of her phone case.

Defendant testified in his own defense. He stated on the night of the robbery he was at home at around 7:00 p.m., after picking up his wife from work; that between 8:00 and 9:00 p.m., he was out shopping at various stores; and that at around 10:30 p.m. when the robbery occurred, he was driving alone to his mother-in-law's house located near 41st

Street and National Avenue. When asked how he came into possession of Jennifer's personal property, defendant claimed he found it after exiting the freeway, while waiting at a stoplight.

Specifically, defendant claimed that, because the stoplight would not change from red to green, after about four or five minutes he "jumped out" of his car and pressed "the button at the light." As he did so, defendant saw the bank cards, a phone, and other items laying on the side of the road. After picking up the items, he stopped at a park, where by happenstance he saw his friend, who got into the car and drove with defendant to the Jack in the Box to purchase food with the bank cards found by defendant. His friend was also in the car when they went to Tacos El Paisa about an hour later.

When asked about the replica gun, defendant testified it belonged to his "little brother." Defendant further testified he had found the gun on his brother after picking him up from school a few days before police searched his car. Defendant admitted the gun looked real.

Defendant testified he could not explain why he kept Jennifer's phone and bank cards in his car after finding them on the side of the road on February 22. He admitted he wanted to sell Jennifer's phone, but did not believe it was worth much because a new version of the phone had come on the market. Finally, defendant denied being a gang member, and stated he kept the red bandana in his car because red was his "favorite color."

DISCUSSION

I

Imposition of Fines, Fees, and Assessments

As summarized *ante*, the record shows that at defendant's initial sentencing, and then a few weeks later at his resentencing, the court, without objection, imposed a restitution fine and various other fees and assessments. As also noted, defendant first raised the issue of his alleged inability to pay these fines, fees and assessments in this appeal, relying on *Dueñas*, *supra*, 30 Cal.App.5th 1157.

In *Dueñas*, the defendant at sentencing objected on due process grounds to the trial court's imposition of a \$30 court facilities assessment (Gov. Code, § 70373), a \$40 court operations assessment (§ 1465.8), and a statutory minimum \$150 restitution fine (§ 1202.4, subd. (b)(1)). (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1162.) The defendant in *Dueñas* was a probationer who suffered from cerebral palsy, was indigent, homeless, and the mother of young children. The court agreed to, and held, a separate ability-to-pay hearing as requested by the defendant.

The trial court at that hearing considered the defendant's "uncontested declaration concerning her financial circumstances, determined that she lacked the ability to pay the previously ordered attorney fees, and waived them on the basis of her indigence. The court concluded that the \$30 court facilities assessment under Government Code section 70373 and \$40 court operations assessment under . . . section 1465.8 were both mandatory regardless of [her] inability to pay them" (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1163), and that she failed to show " 'compelling and extraordinary reasons' required by

statute (Pen. Code, § 1202.4, subd. (c)) to justify waiving [the \$150] fine. The court rejected Dueñas's constitutional arguments that due process and equal protection required the court to consider her ability to pay these fines and assessments." (*Dueñas*, at p. 1163.)

In reversing, the *Dueñas* court concluded that "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's *present* ability to pay before it imposes court facilities and court operations assessments under . . . section 1465.8 and Government Code section 70373" (*Dueñas, supra*, 30 Cal.App.5th at p. 1164, italics added); and that, "although . . . section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of *any* restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the *present* ability to pay the restitution fine." (*Ibid.*, italics added.)

In *People v. Frandsen* (2019) 33 Cal.App.5th 1153 (*Frandsen*), the trial court imposed a \$10,000 restitution fine (§ 1202.4, subd. (b)(1)); a \$60 court operations assessment (§ 1465.8, subd. (a)(1)); and a \$60 facilities assessment. (Gov. Code, § 70373). Although Frandsen, much like defendant in the instant case, conceded his trial counsel failed to object at sentencing to the restitution fine and the fees and assessments, relying on *Dueñas* he contended there was no forfeiture because he presented a purely legal claim that could be raised for the first time on appeal.

In rejecting this contention, the *Frandsen* court correctly recognized that the defendant did not "present a pure question of law based on undisputed facts. [Citation.]

Rather, he request[ed] a factual determination of his alleged inability to pay based on a record that contain[ed] nothing more than his reliance on appointed counsel at trial."

(*Frandsen, supra*, 33 Cal.App.5th at p. 1153.)

Like our defendant in the instant case, the defendant in *Frandsen* also contended that his failure at sentencing to object to the fine and assessments based on inability to pay was excused because *Dueñas* represented a "dramatic and unforeseen change in the law governing assessments and restitution fines" and thus, any objection would have been "futile." (*Frandsen, supra*, 33 Cal.App.5th at p. 1153.) The court in *Frandsen* rejected this argument in part because the defendant's inability to pay was a consideration under section 1202.4, subdivision (c).⁵

That is, unlike the situation in *Dueñas* where the court had imposed the minimum restitution fine, which, as result of subdivision (c) of section 1202.4, defendant could not object to on the grounds of inability to pay, the defendant in *Frandsen* had a statutory right to object under subdivision (c) — at least with respect to \$9,700 of the \$10,000 fine imposed on him. The *Frandsen* court therefore found that a separate ability-to-pay hearing was unnecessary and that, at least with respect to the restitution fine, defendant had forfeited that issue on appeal by failing to raise it in the trial court. (*Frandsen, supra*, 33 Cal.App.5th at p. 1154, citing § 1202.4, subd. (d).)

⁵ Specifically, subdivision (c) of section 1202.4 in part provides: "The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine pursuant to paragraph (1) of subdivision (b)."

Turning to the instant case, we conclude it is more akin to *Frandsen* than to *Dueñas*, inasmuch as the trial court in the instant case twice imposed without objection a restitution fine under subdivision (b)(1) of section 1202.4 above the statutory minimum. Thus, like the defendant in *Frandsen* and unlike the defendant in *Dueñas*, defendant in the instant case had a statutory right to object to the fine as set forth in subdivision (c) of this statute, but did not do so. As such, we conclude defendant forfeited his inability-to-pay claim based on his failure to raise it below.

With respect to the remaining fees and assessments imposed on defendant, we likewise conclude he forfeited his claim, either because he chose not to object to a restitution fine allegedly excessive in a similar amount (see *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033 (*Gutierrez*)), or because he had the right to object to such under the excessive fees clause of the Eighth Amendment to the federal Constitution. (*Gutierrez*, at p. 1040 [conc. opn.].) In any event, we can infer that, unlike the probationer defendant in *Dueñas*, the defendant in the instant case has the ability to pay the remaining fees and assessments, which total less than \$500, including from probable prison wages based on his 15-year prison sentence. (See *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397 [concluding a fine imposed under section 1202.4 "may be based on the wages a defendant will earn in prison"]; § 1202.4, subd. (d) [noting the consideration of a "defendant's inability to pay may include his or her future earning capacity"]; Cal. Code Regs., tit. 15, § 3041.2 [noting prison wages range from a minimum of \$12 to \$56 per month depending on the prisoner's skill level]; § 2085.5, subd. (a) [noting the Department of Corrections and Rehabilitation may garnish between

20 and 50 percent of a prisoner's wages to pay the restitution fine].) For this separate reason we reject this claim of error.

II

Senate Bill No. 1393

As noted *ante*, defendant seeks remand to allow the trial court the opportunity to exercise its newly given discretion provided by Senate Bill No. 1393 to dismiss or strike his serious felony prior that was used by the court to impose the five-year enhancement under section 667, subdivision (a)(1). Prior to Senate Bill No. 1393's adoption, the law prohibited courts from striking felony priors used for purposes of the section 667 enhancement. (Former § 1385, subd. (b).) However, effective January 1, 2019, Senate Bill No. 1393 removed that prohibition. Defendant contends Senate Bill No. 1393 is retroactive and applies to all cases not yet final as of its effective date, such as the instant case. While we generally agree with this contention, we find it unnecessary to remand under the facts of the instant case.

Indeed, the record here shows during sentencing the court twice unambiguously stated that, even *if* it had the discretion to dismiss or strike the serious felony prior, it would not do so. The court stated, "at present the court has no discretion to strike or stay" what it referred to as the "nickel prior," then in the next sentence stated: "And I can tell you that even if I had discretion to strike, I don't think I — *I know I wouldn't.*" (Italics added.)

Immediately thereafter, the court gave the reason it would not strike the serious felony prior even *if* it then had such discretion, stating: "In the [section] 459 [prior] that

[defendant] was involved and a gun was taken, it was very recent [i.e., October 2016], and he was armed at the time of his arrest. So, those things *don't indicate to me that even if I had discretion, I should exercise it and strike it in the nickel prior. So, it's going to be a substantial sentence.* The question is, how substantial." (Italics added)

Because the record shows the trial court clearly indicated during sentencing that it would not have struck defendant's serious felony prior even if it had the discretion to so, we decline to remand the matter for resentencing pursuant to Senate Bill No. 1393. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [noting when the "egregiousness of a defendant's crimes, a defendant's criminal history, and the court's sentencing options and rulings . . . prompt the court to express its intent to impose the maximum sentence permitted[, and w]hen such an expression is reflected in the appellate record, a remand would be an idle act because the record contains a clear indication that the court will not exercise its discretion in the defendant's favor"]; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining remand when the trial court indicated defendant was the " 'kind of individual the law was intended to keep off the street as long as possible' "].)

DISPOSITION

The judgment is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.